IN THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF OHIO Eastern Division

IN RE:

IN PROCEEDINGS UNDER CHAPTER 13

ROBERT AND MARILYN STEWART,

CASE NO. 01-122619

ADVERSARY PROCEEDING NO. 02-1052

Debtors.

JUDGE RANDOLPH BAXTER

MYRON E. WASSERMAN, TRUSTEE,

Plaintiff,

v.

HOUSEHOLD REALTY CORP.,

Defendant.

MEMORANDUM OF OPINION AND ORDER

In this adversary proceeding, the Chapter 13 Trustee, Myron E. Wasserman, (Trustee), seeks to set aside a mortgage on the personal residence of Robert F. and Marilyn A. Stewart (Debtors) upon the allegation that said mortgage was executed defectively in derogation of applicable Ohio law. Household Realty Corporation (Household), the mortgagee, opposes such relief. Upon conclusion of a trial proceeding and an examination of the testimony and other evidence adduced, the following constitutes the Court's factual findings and conclusions of law:

Core Jurisdiction of this matter is acquired under provisions of 28 U.S.C. § 157(b)(2)(A)and (I), 28 U.S.C. § 1334, and General Order No. 84 of this District.

The Debtors reside at 2024 Elbur Avenue in the city of Lakewood, Ohio. They purchased their home in 1966 and have lived in it since the time of purchase. Their residence was originally mortgaged through National City Bank to secure its loan. (M. Stewart, Direct). Subsequently, the home was refinanced through a succession of mortgage transactions with Society Bank, Beneficial Finance, Norwest Bank, and most recently with the Defendant, Household. The Debtors executed a Mortgage on September 22, 1999 in the principal sum of \$118,890.35 with Household, as mortgagee. The Mortgage was filed for record on September 23, 1999 in Cuyahoga County. The Debtors also executed an Open-End Mortgage on September 22, 1999 in the principal amount of \$10,000.00 with Household, as mortgagee. The Open-End Mortgage was filed for record on September 23, 1999 in Cuyahoga County. The Debtors filed for relief under Chapter 7 of the Bankruptcy Code on December 27, 2001. The Trustee filed the above-referenced adversary complaint on January 31, 2002.

The Trustee brings this action challenging the above-referenced mortgage and open-end mortgage (hereinafter "mortgages"), asserting that the mortgages were defectively executed in the presence of only one witness, in violation of O.R.C. § 5301.01. The Trustee further contends that pursuant to provisions of O.R.C. §§ 5301.01, § 5301.25, said mortgages are avoidable as being unperfected as of the date of the bankruptcy petition filing date, December 27, 2001. Similarly, the Trustee contends, on the same factual and statutory basis, that the attendant mortgages which were filed of record on September 23, 1999, are subject to be set aside, pursuant to the Trustee's avoidance powers under section 544 of the Bankruptcy Code. [11 U.S.C. § 544].

Household, opposes the relief sought by the Trustee on the basis that two witnesses were present at the executions of the mortgages, as required under the Ohio Revised Code. Thus,

Household contends it holds valid mortgages on the Debtors' residence. Household also challenges the Trustee's complaint, in light of the amendment to § 5301.01 and the Ohio Supreme Court's ruling in *In re Stewart*. In addition, Household asserts that any interest inuring to the benefit of the Debtors' bankruptcy estate is subordinated to any interest held by Household pursuant to § 550(e) of the Bankruptcy Code. [11 U.S.C. § 550(e)].

II.

The threshold issue is whether the mortgages executed between the Debtors and Household and filed for record on September 23, 1999 were validly executed pursuant to applicable state law.

III.

The Ohio legislature recently amended section 5301.01 of the Ohio Revised Code, which became effective on February 1, 2002. Prior to this recent amendment, this section provided in part: "A ... mortgage ... shall be signed by the ... mortgagor [and] [t]he signing shall be acknowledged by the ... mortgagor ... in the presence of two witnesses, who shall attest the signing and subscribe their names to the attestation." Ohio Rev. Code Ann. § 5301.01 (2001).

Following several court decisions which invalidated mortgages executed in the presence of one witness, the Ohio Legislature enacted O.R.C. § 5301.234, which provided in relevant part that any recorded mortgage is irrebuttably presumed to be properly executed, regardless of any actual or alleged defect in the witnessing or acknowledgment on the mortgage....Ohio Rev. Code. Ann. § 5301.234 (2001). Thereafter, this Court in *Myron Wasserman, Trustee v. Household Realty Corp* (*In re Barkley*), 263 B.R. 553 (Bankr. N.D. Ohio 2001) ruled that Section 5301.234 was in violation of the Ohio "one subject rule." The bill, in which § 5301.234 was included, contained legislation

¹96 Ohio St. 3d 67 (2002).

relating to a broad range of other subjects and was found to be in violation of Art. II, §15(D) of the Ohio Constitution, which states:

No bill shall contain more than one subject, which shall be clearly expressed in the title. No law shall be revived or amended unless the new act contains the entire act revived, or the section or sections amended shall be repealed.

The Ohio Legislature subsequently amended O.R.C. § 530 1.01 and repealed O.R.C. § 5301.234. Section 5301.01, as amended, now provides in relevant part:,

- (1) If a ..., mortgage, ... was executed prior to the effective date of this amendment and was not acknowledged in the presence of, or was not attested by, two witnesses as required by this section prior to that effective date, both of the following apply:
- (a) The instrument is deemed properly executed and is presumed to be valid unless the signature of the ... mortgagor ... was obtained by fraud.
- (b) The recording of the instrument in the office of the county recorder of the county in which the subject property is situated is constructive notice of the instrument to all persons, including without limitation, a subsequent purchaser in good faith or any other subsequent holder of an interest in the property, regardless of whether the instrument was recorded prior to, on, or after the effective date of this amendment. (2) Division (B)(1) of this section does not affect any accrued substantive rights or
- vested rights that came into existence prior to the effective date of this amendment.

The amendment to O.R.C. § 5301.01 became effective on February, 2002.

IV.

Herein, Household relies on the recent amendment to O.R.C. § 5301.01 to challenge the Trustee's complaint on the basis that the Ohio legislature has regarded the attestation of one witness to be sufficient under Ohio law. Household directs the Court to the Ohio Supreme Court's recent decision In Re Stewart. On certification by the Bankruptcy Appellate Panel of the United States Court of Appeals for the Sixth Circuit, the Ohio Supreme Court articulated the following:

This matter is before the court on a certified question of state law from the Bankruptcy Appellate Panel of the United States Sixth Circuit Court of Appeals. The panel certified the following question:

"Can Ohio Revised Code § 5301.234 be applied to presume the validity of a mortgage in a bankruptcy case filed after the effective date of the statute, when the mortgage at issue in the bankruptcy case was recorded before the statute's effective date?"

The certified question is answered in the affirmative.

Relying on this decision and the recent amendment to O.R.C. § 5301.01, Household contends that its mortgages are valid.

The Trustee refutes the applicability of the *Stewart* decision noting that the Ohio Supreme Court discussed the application of Section 5301.234, although the section was repealed prior to the *Stewart* decision. The Trustee further noted that the Debtors' bankruptcy filing, in the case at bar, was filed before the effective date of O.R.C. § 5301.01. Lastly, the Trustee contends that § 5301.01 specifically provides an exception in § 5301(b)(2) which provides, "this section does not affect any accrued substantive rights or vested rights that came into existence prior to the effective date of this amendment."

When the General Assembly repealed § 5301.234 and adopted its amendments to § 5301.01, it made its legislative intent clear in Substitute House Bill 279 with regard to the issue of retroactivity. Section 3 of that Bill stated that the Assembly "declares its intent that the amendment made by this act to § section 5301.01 of the Revised Code is retrospective in its operation and is remedial in its application to instruments described in that section that were executed or recorded prior to the effective date of this act, except that the amendment does not affect any substantive rights or vested rights that came into existence prior to the effective date of this act." (emphasis added). Section § 5301.01, as amended is a remedial provision, which seeks to accomplish the "curing [of] ... defects, ... in instruments ..., arising out of their want of conformity with the laws"

of Ohio. Kovacs v. First Union Home Equity Bank (In re Huffman), 2002 U.S. Dist. LEXIS 23260 (N.D. Ohio 2002). The effective date of O.R.C. § 5301.01, as amended, is February 1, 2002. The Debtors' case was filed on December 27, 2001, thus the Trustee's rights vested in the Debtor's property on December 27, 2001, which is prior to the effective date of amended O.R.C. § 5301.01. Since § 5301.01(b)(2) provides an exception to the general rule, the Trustee in this case may properly seek the avoidance of the subject mortgages pursuant to section 544 of the Bankruptcy Code. *See In re Cowan*, 273 B.R. 98, 105 (B.A.P. 6th Cir. 2002).

Section 544 (a), the so-called "strong arm" provision of the Bankruptcy Code, enables a bankruptcy trustee to avoid transfers of property that would be avoidable by a bona fide purchaser. That section provides, in pertinent part:

- (a) The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by--
 - (3) a bona fide purchaser of real property, other than fixtures, from the debtor, against whom applicable law permits such transfer to be perfected, that obtains the status of a bona fide purchaser and has perfected such transfer at the time of the commencement of the case, whether or not such a purchaser exists.

11 U.S.C. § 544(a)(3). Generally, in lien avoidance actions, the burden of proof is upon the complainant who bears that burden by a clear and convincing evidence standard. *Simon v. Chase Manhattan Bank*(*In re Zaptocky*), 250 F.3d 1020, 1025 (6th Cir. 2001); *Simon v. First Union Mortgage Corp.* (*In re Burnham*), 231 B.R. 270, 271(Bankr. N.D. Ohio 1999). Herein, that burden is upon the Trustee who seeks to set aside the subject mortgages. In light of § 5301.01 requiring the attestation of two witnesses, which was applicable at the time of the bankruptcy filing, and the repeal

of § 5301.234, the Trustee, herein, must prove that only one witness executed the subject mortgages.

During the prosecution of the Trustee's case-in-chief, both co-debtors, aged 67 and 63 years old, respectively, were credible witnesses. Their testimony was unequivocal. Both testified, emphatically, that only Robert Gerasic, Household's loan officer, was with them throughout the loan closing transaction on September 22, 1999, when they signed the mortgage and mortgage deed. The Debtors further testified that no one else came into the office for any purpose. (Debtors, direct and cross-exam; Plt. Exhs. 1 and 2). They acknowledged that they were familiar with both documents and also acknowledged their respective signatures on each document. The document execution occurred at Household's office on Lorain Avenue in Lakewood. (*Id.*) Although the parties herein dispute the configuration of Household's office in which the signings occurred, it is undisputed that the subject transaction occurred at Household's office and was solicited by Household's agents.

The Debtors, both high school graduates, purchased their home in 1966. The home has undergone five mortgage transactions, including the latest with Household. Apparently, they were generally familiar with the mortgage transaction process.

Linda R. Webber is a six and one-half year sales assistant with Household. Ms. Webber is employed at Household's North Olmstead, Ohio office, and was on duty at that location on September 22, 1999. Her testimony was generally credible, but she had no specific recollection of the Debtors or the mortgage transaction which closed at Household's office on September 22, 1999. (L.R. Webber, Court Inquiry) involving the Debtors. She testified as to her usual practice and procedures relative to the attestation and notarization of documents she handles for Household. Her duties at Household include customer service work and the processing of documentation related to loan closings. Additionally, she is a notary public since 1997 and notarizes documentation

exclusively for Household while under its employ. At Plaintiff's Exhibits 1-4 and 2-4, she testified that her signature appears on both documents (Mortgage and Open-End Mortgage) as a witness and as the notary. There was no testimony that she witnessed and notarized these documents in the presence of the Debtors, as she had no specific recollection of the subject transaction. (Webber, Id.).

Based on the testimony adduced herein, the Court finds that the subject mortgages were defectively executed in the presence of, at most, one witness and are avoidable by the Trustee under section 544(a) of the Code.

Section 550(e)

Household argues that, in the event the Trustee can avoid its interests, they may recover under § 550(e) of the Code. Under the Sixth Circuit BAP's decision in *Suhar v. Burns (In re Burns)*, 269 B.R. 20 (B.A.P. 6th Cir. 2001), a § 544 avoidance of a mortgage is a complete remedy and it is not necessary for the Trustee to take the additional step of recovering the mortgagee's interest in the property under § 550. The defense set out in § 550(e) would not, therefore, be available to Household. *See also In re Barkley*, 263 B.R. 553, 565 (Bankr. N.D. Ohio 2001).

Accordingly, the Trustee's complaint to set aside the mortgage and the open-end mortgage granted in favor of Household is hereby granted. Each party is to bear its respective costs.

IT IS SO ORDERED.

Dated, this day of February, 2003

RANDOLPH BAXTER

UNITED STATES BANKRUPTCY JUDGE

CERTIFICATION OF SERVICE

I,	hereby certify	that a	a copy of	the	foregoing	Memorandum	οÍ
Opinion	and Order was	mailed	by regul.	ar U.	. S. Mail	this 10th	
day of _	FEBRUARY		2003_	to t	he follow	ing parties	:

KENNETH J. FREEMAN (COURT BOX) ATTY. FOR PLAINTIFF

KEITH D, WEINER & ASSOC. 75 PUBLIC SQUARE, 4th fl. CLEVELAND, OHIO 44113 ATTY. FOR DEFENDANT

CRAIG SHOPNECK (COURT BOX)
TRUSTEE

U.S. TRUSTEE (COURT BOX)

Deputy Clerk

IN THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF OHIO Eastern Division

IN RE:	IN PROCEEDINGS UNDER CHAPTER 13					
ROBERT AND MARILYN STEWART,	CASE NO. 01-122619					
Debtors.	ADVERSARY PROCEEDING NO. 02-1052 JUDGE RANDOLPH BAXTER					
MYRON E. WASSERMAN, TRUSTEE,						
Plaintiff, v.						
HOUSEHOLD REALTY CORP.,						
Defendant.						
JUD	GMENT					
At Cleveland, in said District, on this	day of February, 2003.					
A Memorandum Of Opinion And O	rder having been rendered by the Court in this					
proceeding,						
IT IS THEREFORE ORDERED, AI	DJUDGED AND DECREED that the Trustee's					
complaint to set aside the mortgage and ope	en-end mortgage granted in favor of Household					
Realty Corporation is hereby granted. Each IT IS SO ORDERED.	party is to bear its respective costs. Color Carte RANDOLPH BAXTER					

UNITED STATES BANKRUPTCY JUDGE

CERTIFICATION OF SERVICE

	I, hereby certify	y that	tac	opy of	the	foreg	oing	Judgment	Entry
was	mailed by regular	U.S.	Mail	this_	10th	_day	of	FEBRUARY	
2003	to the following	parti	ies:						

KENNETH J. FREEMAN (COURT BOX) ATTY. FOR PLAINTIFF

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